



September 6, 2007

TO: Joint Interim Study Committee

FROM: Terry Timmins, Associate General Counsel

SUBJECT: Open Meeting/Open Records Issues

On behalf of the Iowa League of Cities, I would like to express our appreciation for the opportunity to address the Committee today. At its meeting on August 30th, the League's Executive Board adopted its legislative priorities for the upcoming Session, and while none of those priorities speak to open meetings or open records, I think it would be safe to say that the League Board and its member cities wholeheartedly support openness in government, but openness that is appropriately balanced by the interests of effectiveness in government.

We share the observations of others who have testified today about where the problems are with enforcement of the open meetings and open records laws. Governmental entities and the press really don't have any serious ongoing issues over open meetings or open records, with perhaps the exception of the walking quorum issue. Most of the issues between government and the media have been worked out in court cases (City of Dubuque v Dubuque Racing Ass'n, Ltd, 1988; City of Sioux City v Greater Sioux City Press Club, 1988), or they have been worked out in legislative amendments allowing closed sessions or exempting certain records from public examination (ISU foundation donor information), or they have been worked out in tacit agreements between governmental entities and the press (keeping rape victims names confidential). Many of the current problems with openness in government occur between government and its citizens, and are probably the result of lack of knowledge about open meetings and open records requirements.

The League constantly attempts to educate its members on those requirements. Staff of the League's Membership Services Department frequently receive open meetings and open records questions from city officials and they tend to give fairly conservative guidance in response to those questions – guidance which is usually followed. The League has produced open meetings and open records brochures that it provides to city officials at various meetings and workshops. In late November and early December this year, after the city elections are concluded, the League will sponsor a series of six Municipal Leadership Academy workshops around the state for newly elected and appointed city officials. As I did two years ago, I will be making a presentation on city legal issues at those workshops – including coverage of open meetings and open records requirements.

Despite those efforts, it would appear that our message on openness in government doesn't always reach all of our communities and all of our city officials. High profile cases will probably continue to arise from time to time, involving local disputes where an open meetings issue or an open records issue becomes the flashpoint, but we don't see an increase in the incidence or severity of such violations as others have described. Clearly, there is probably a need for more education of local officials as to open meetings and open records requirements.

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The League recognizes that the Committee is committed to addressing the open meetings and open records laws and updating them to bring them into the 21st century, and we applaud that effort. We would only request that in doing so, the interests of openness in government be balanced by the interests of effectiveness in government.

In preparation for this presentation, I solicited the views of a number of city attorneys around the State about the open meetings law and the open records law. Many of the concerns expressed by those city attorneys involved the impacts of open meetings and open records requirements on the effectiveness of city government, and many of their concerns coincide with those expressed by Professor Bonfield. So what I want to do is outline for the Committee the views of those city attorneys, starting with the open meetings law.

A. Open Meetings

1. One of the views expressed by several city attorneys, and supported by the League, is that a closed session should be allowed both to interview and to review the credentials of job applicants, and for evaluation of employees whose performance or discharge is being considered, without having to show needless and irreparable injury to that person and without having to have a request from that person for a closed session. The concern is that requiring the evaluation of job applicants or employees to occur in open session discourages council members from being candid in their inquiry and in their comparison or assessment of those individuals, either for fear of embarrassing those persons, for fear of confrontation, or in some instances for fear of precipitating a lawsuit by those individuals. Without such candid inquiry, comparison and assessment, the public will likely be poorly served in the decision who to employ or who to terminate.

2. City councils are often in the position of having to approve contracts negotiated by their staff, and they often want to be in a position to give direction to staff as to the city's negotiating position, or as to the negotiating position of the other party to the contract. City staff typically want to obtain the council's perspective on critical contract terms, such as the price range or range of compensation, before they finalize those contracts and bring them back to the council for approval. Those strategy discussions really can't occur in public, because that would give advantage to the other side in those negotiations. Consequently, the view has been expressed that a governmental body should be allowed to have a closed session with its staff to discuss and give direction regarding the negotiation of contracts, and that would include economic development contracts, labor contracts, franchise agreements, contracts or offers involving the purchase or sale of real estate, and regarding the negotiation, renegotiation and renewal of leases and operating agreements.

B. Open Records

On the open records side, the League supports the view that a draft of any contract that is being negotiated, and any staff reports about the contract and its negotiation, should be confidential until negotiations are completed and the contract is presented to the governmental entity for approval.

4. When a governmental entity is acquiring property, say for a public improvement project, Chapter 6B of the Code requires the governmental entity to get an appraisal of the value of the property that it is acquiring. Section 22.7 of the open records statute protects appraisals and appraisal information until the project has been publicly announced. Chapter 6B of the Code has been carefully crafted over several recent legislative sessions to require the disclosure of the appraisal or appraisal information to the seller at the time the governmental entity makes an offer to purchase particular property. The League supports the view that Section 22.7 should be amended to coincide with Chapter 6B – Section 22.7 should be amended to provide that appraisals or appraisal information should be confidential until the governmental entity makes an offer to purchase the property. Governmental bodies often get property appraisals in project planning stages and they sometimes decide not to pursue a project because of potential property acquisition costs. Disclosure of that information to third parties or to the public, prior to the making of a purchase offer, only makes the property purchasing process more difficult. What property owner would be pleased to learn that his or her property has been appraised even before the governmental body has decided to purchase it, or before the governmental entity has approached the property owner about purchasing it?
5. The League supports the view that bid tabulations and proposal evaluation reports, which are created by staff for consideration by the governmental body, should be confidential until staff makes its recommendation to the governmental body as to the lowest responsible, responsive bid or as to the best proposal.
6. The open meetings law currently allows closed session discussion to review or discuss records which are required or authorized by state or federal law to be kept confidential. For purposes of symmetry and consistency, the League supports the view that documents which are developed and provided to the governmental body to aid in a closed session discussion of a matter should also be exempt from public records disclosure.
7. The open records law currently makes confidential Iowa department of economic development information on an industrial prospect with which the department is currently negotiating. The League supports the view that this confidentiality exemption should be extended to other governmental entities that have such information in their possession relating to negotiations with commercial or industrial prospects.
8. The League would support the view that the provision which makes confidential “personal information in confidential personnel records of public bodies” needs to be clarified.
9. The League supports the view that governmental bodies should not have to publish minutes of a work session if all the body did was discuss issues with staff and deliberate as a body, but took no action. A meeting notice should be published, and the meeting should be held in open session, but there should be no requirement that minutes of such a meeting be published.
10. Finally, the League supports the view that disclosure of a confidential record, or the content of a closed session discussion, to a person outside of the governmental entity should be prohibited, and a governmental body should be allowed to sanction a person who discloses confidential information to a third party to the detriment of the governmental entity or to the detriment of the privacy interests of any person.

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Conclusion

The Iowa League of Cities is strongly committed to assisting the Committee in its efforts to update the open meetings and the open records laws. The Committee can consider the League a resource in that effort. We are anxious to acquaint you with how cities operate under current open meetings and open records requirements, and with the challenges that cities face in honoring those requirements and in operating effectively and efficiently.